ANG HIOK SENG

v.

YIM YUT KIU

FEDERAL COURT, JOHOR BAHRU
CHONG SIEW FAI CJ (SABAH & SARAWAK)
MOHD AZMI FCJ
WAN ADNAN ISMAIL FCJ
[CIVIL APPEAL NO: 02-734 OF 1993]
18 DECEMBER 1996

EVIDENCE: *Fraud in civil proceedings - Whether could be civil or criminal in nature - Standard of proof - Whether proof beyond reasonable doubt - Allegation founded on civil fraud - Whether required only proof on balance of probabilities - Contracts Act 1950 s. 17.*

CONTRACT: *Remedy - Specific performance - Lease agreement - Option to purchase land - Whether option agreement obtained by fraudulent means - Opportunity and motive to commit fraud - Whether a relevant factor - Valuation Report of land tainted with irregularity - Effect - Whether fatal to claim of specific performance - Contracts Act 1950 s. 17.*

Mr. Chan Weng Sun (Mr. Chan), the late husband of the respondent, was the registered owner of some 19 acres of his family's ancestral land in Johore Bahru. In 1971, Mr. Chan executed a lease agreement with the appellant to whom he leased the land for 15 years. By the terms of the lease, the appellant undertook to develop the land into a fruit orchard, and reap the benefit thereof until 1986, by which time, the orchard would be handed back to Mr. Chan. By reason apparently of the high capital expenditure that Mr. Chan had to incur in developing the land, cl. 11 of the lease provided that if Mr. Chan were to ever sell the land during the currency of the lease he must only sell it to the appellant **"at a price to be fixed by a qualified valuer to be appointed by both the parties"**. Clause 11 notwithstanding, the appellant alleged that by an option agreement dated 5 January 1977, Mr. Chan had agreed to sell the land to him at a price of RM80,000, and sought for specific performance thereof. The respondent contended that the option agreement was brought into existence by fraud, in that the appellant had fraudulently induced Mr. Chan to sign the same by falsely representing to him that the option was merely intended to test the market value of the land and nothing else.

The facts showed that, despite a Valuation Report being tendered by the appellant which suggested that RM80,000 was the prevailing market price of the land under the encumbrance of the lease agreement, the alleged sale price was way below the market price. It was also not in dispute that Mr. Chan, upon discovering the true nature and effect of the option agreement, wasted

no time in chiding the appellant and protesting against the same. In the Court below, the learned trial Judge, applying the civil burden of proof on the plea of fraud, ruled that Mr. Chan had indeed been fraudulently induced by misrepresentation as to the purpose of the option agreement, and on that ground dismissed the appellant's claim. The appellant appealed and the primary questions that arose were:

(i) whether in the totality of the oral and documentary evidence there was fraud as defined in s. 17 of the Contracts Act 1950.

(ii) whether the alleged fraud was criminal or civil in nature.

(iii) whether the learned trial Judge was right in applying the civil burden of proof to the issue of fraud herein.

Held:

Per Mohd Azmi FCJ (delivering the judgment of the Court):

[1] The selling price of RM80,000 in the 1977 option is in conflict with the express intention of the parties under cl. 11 of the lease that the price should be valued by a qualified valuer to be mutually appointed by both parties.

[2] There was no conceivable reason why in 1977 the deceased should suddenly entertain the idea of selling the property by means of a fresh option to purchase to the appellant at a ridiculously low price of RM80,000, when there was already in existence a mechanism in the lease agreement for such eventuality. The arbitrary price of RM80,000 in the disputed document would appear to be the appellant's own concoction to which the late Mr. Chan ought not and could not on a balance of probabilities have agreed without the benefit of a professional valuation at the material time. The three letters of protest written by Mr. Chan were consistent with the defence version that the deceased at no time had any intention to sell the ancestral land to anyone.

[3] It could not be true as alleged by the appellant that it was the late Mr. Chan himself for some unknown reason who had told him that he wished to sell the property at the price of RM80,000. In the circumstances, the learned trial Judge was entitled to accept the defence explanation that in fact it was the appellant who wanted the document to be executed and that the late Mr. Chan had been fraudulently induced by misrepresentation as to the purpose of the option agreement.

[4] The whole development of the dusun was in the nature of a joint-venture for a period of 15 years. This being the case, although they were not partners under the Partnership Act, there was fiduciary relationship between them as to obligate the appellant to remind Mr. Chan, even assuming that the latter did intend to sell the property as alleged, that cl. 11 of the lease agreement required the purchase price to be fixed by a valuer to be appointed by them jointly. It was a breach of good faith and fiduciary duty for the appellant to purchase the property at RM80,000 without first obtaining the opinion of professional valuer as stipulated by clause 11.

[5] By the lease agreement, the appellant was to spend some RM100,000 to turn the barren land into an orchard, but could only earn an income of RM35,000 per annum from 1984 onwards. Thus, by the time the lease ended in 1986, the appellant could only manage to get back his capital expenditure with only little profit if at all. For such a low return, there must be miscalculation somewhere in the joint venture development of the land on the part of the appellant. On the other hand, Mr. Chan, whilst getting no income at all from the land for 15 years, would thereafter reap the benefit of being the owner of a valuable orchard. In the circumstances, it was not wrong for the learned Judge to find normality in Mr. Chan's curiosity in 1977 to know the value of his up and coming dusun. It was therefore easy for the appellant to exploit the situation by fraudulently misrepresenting that the so-called option document was not for the purpose of sale to him but merely to test the property market. The motive and opportunity for the plaintiff to commit fraud on the late Mr. Chan by means of the option document is all too clear.

[6] In the context of the business arrangement between them, as represented by the lease agreement, there can be no doubt that fraud had been established by the appellant's act in deceiving and inducing the deceased to sign the option agreement within the meaning of s. 17 Contracts Act 1950. We could not see any purpose of the option agreement other than as a ploy to deprive the late Mr. Chan of the true market value of the dusun.

[7] Apart from the irrelevancy of the appellant's valuation report to support the price of RM80,000 under cl. 11, the report clearly did not comply with the principle of valuation in determining whether or not the dusun should be valued as an encumbered property, by reason of the lease agreement. It is wrong to value the dusun as an encumbered property during the period of the registered lease when the intended purchaser is also the lessee.

[8] The lease thus could not form an encumbrance for the purpose of valuation. The admission of the incorrect basis of valuation can only mean that the plaintiff's valuation report fixing the price of RM80,000 is totally wrong and must be rejected. Since the sale price of RM80,000 is unreliable and grossly inadequate and fixed in breach of cl. 11 of the lease agreement, specific performance ought not in any event be granted.

[9] The basis of the remedy of specific performance lies in equity and as such, where as here the plaintiff did not come with clean hands, the Court was entitled in any event to refuse the remedy in order to protect the vendor from being a victim of sharp practice.

[10] Where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud, or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on a balance of probabilities. However, where the allegation is entirely founded on a civil fraud and not on a criminal conduct or offence, the civil burden is applicable.

[11] We agree with both Counsel that to the extent that the general statement of the law in *Lau Kee Ko & Anor. v. Paw Ngi Siu* [1974] 1 MLJ 21 is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no longer good law.

[12] The sharp practice as perpetrated by the appellant on the deceased herein did not amount to a criminal offence. The fraudulent act complained of was not only in the procurement of the option agreement, but also in using the document for a purpose in breach of cl. 11. Since the allegation of fraud was purely civil in nature and not based on or connected with a criminal offence, the learned Judge did not err in law in applying the civil burden of proof.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

KETERANGAN: *Fraud dalam prosiding-prosiding sivil - Samada mungkin bersifat sivil atau jenayah - Standard bukti - Samada bukti tidak diragui - Pengataan berasaskan fraud sivil - Samada hanya memerlukan bukti atas imbangan kebarangkalian - Akta Kontrak 1950 s. 17.*

KONTRAK: *Remedi - Pelaksanaan spesifik - Perjanjian pajakan - Pilihan untuk membeli tanah - Samada perjanjian opsyen diperolehi secara fraud - Peluang dan motif untuk melakukan fraud - Samada merupakan satu faktor yang relevan - Laporan penilaian tanah tercemar oleh luar aturan - Kesan - Samada memudaratkan tuntutan untuk pelaksanaan spesifik - Akta Kontrak 1950 s. 17.*

Encik Chan Weng Sun (Encik Chan), mendiang suami responden, adalah merupakan pemunya berdaftar anggaran 19 ekar tanah pusaka keluarga beliau di Johor Bahru. Dalam tahun 1971, Encik Chan telah menyempurnakan satu perjanjian pajakan dengan perayu di mana beliau telah memajakkan tanah itu bagi tempoh selama 15 tahun. Menurut terma-terma pajakan itu, perayu telah mengakujanji untuk membangunkan tanah itu menjadi sebuah kebun buah-buahan, dan menikmati keuntungannya sehingga 1986, bilamana, kebun buah-buahan itu akan diserahkan balik kepada Encik Chan. Disebabkan dengan nyatanya oleh modal perbelanjaan yang agak tinggi yang harus dialami oleh Encik Chan dalam membangunkan tanah itu, Fasal 11 pajakan itu adalah memperuntukkan bahawa jika Encik Chan berniat untuk menjual tanah itu ketika dalam tempoh masa pajakan tersebut, beliau mestilah hanya menjualkannya kepada perayu "at a price to be fixed by a qualified valuer to be appointed by both the parties." Tanpa menghiraukan Fasal 11, perayu mendakwa bahawa melalui satu perjanjian opsyen bertarikh 5 Januari 1977, Encik Chan telah bersetuju untuk menjual tanah itu kepada beliau pada harga sebanyak RM80,000 dan berusaha untuk mendapatkan pelaksanaan spesifik terhadapnya. Responden menegaskan bahawa perjanjian opsyen itu telah di wujudkan secara fraud, iaitu perayu telah secara fraud memaksa Encik Chan untuk menandatanganinya dengan secara palsu mengemukakan kepada beliau bahawa opsyen itu semata-mata berniat untuk menguji nilai pasaran tanah itu dan tidak lain daripada itu.

Fakta-fakta menunjukkan bahawa, sungguhpun laporan penilaian yang dikemukakan oleh perayu menyarankan bahawa RM80,000 adalah merupakan harga pasaran semasa bagi tanah itu di bawah bebanan perjanjian pajakan tersebut, harga jualan yang dikatakan itu jauh kurang daripada harga pasaran. Adalah juga tidak dipertikaikan bahawa Encik Chan, setelah mendapati sifat sebenar dan kesan perjanjian opsyen itu, tidak berlengah lagi telah menegur perayu dan membantah terhadapnya. Dalam Mahkamah di bawah, Hakim perbicaraan yang bijaksana, dalam memakai beban bukti sivil ke atas rayuan fraud, memutuskan bahawa Encik Chan telah sesungguhnya secara fraud dipaksa melalui salah-nyataan berhubung dengan tujuan perjanjian opsyen tersebut, dan atas alasan itu telah menolak tuntutan perayu. Perayu telah merayu dan persoalan utama yang telah berbangkit adalah:

(i) samada secara keseluruhan keterangan lisan dan dokumentari berlakunya fraud sepertimana yang ditetapkan dalam s. 17 Akta Kontrak 1950.

(ii) samada fraud yang dikatakan itu adalah bersifat jenayah atau sivil.

(iii) samada Hakim perbicaraan yang bijaksana betul dalam mengunakan beban membukti sivil kepada isu fraud di sini.

Diputuskan:

Oleh Mohd Azmi HMP (menyampaikan penghakiman Mahkamah):

[1] Harga jualan sebanyak RM80,000 dalam opsyen tahun 1977 itu adalah bertentangan dengan niat nyata pihak-pihak tersebut di bawah fasal 11 pajakan itu dan bahawa harga itu seharusnya ditaksirkan oleh seorang penilai bertauliah yang harus ditaksirkan oleh seorang penilai bertauliah yang harus dilantik secara berbaik-baik oleh kedua-dua pihak.

[2] Tidak terdapat alasan yang boleh difikirkan mengapa dalam tahun 1977 simati dengan tidak disangka-sangka melayan usul menjual hartanah itu melalui opsyen baru untuk membeli kepada perayu pada harga yang terlalu rendah sebanyak RM80,000, sedangkan telah pun wujud satu mekanisme dalam perjanjian pajakan itu bagi kemungkinan yang sedemikian. Harga timbangtara sebanyak RM80,000 dalam dokumen yang dipertikaikan kelihatan sebagai satu rekaan perayu terhadap yang mana mendiang Encik Chan tidak seharusnya dan tidak mungkin atas imbangan kebarangkalian telah bersetuju tanpa mendapat penilaian profesional pada waktu yang material itu. Ketiga-tiga surat bantahan yang telah ditulis oleh Encik Chan adalah konsisten dengan versi pembelaan bahawa simati tidak pernah berniat untuk menjual tanah pusaka itu kepada sesiapa.

[3] Ianya tidak mungkin benar seperti yang dikatakan oleh perayu bahawa ianya adalah niat mendiang Encik Chan sendiri atas alasan yang tidak diketahui bahawa beliau telah memberitahunya bahawa beliau ingin menjual hartanah itu pada harga RM80,000. Dalam keadaan yang sedemikian, Hakim perbicaraan yang bijaksana berhak untuk menerima penjelasan pembelaan bahawa pada hakikatnya, perayu yang menghendaki dokumen itu disempurnakan dan bahawa mendiang Encik Chan telah secara fraud dipaksa melalui salah-nyataan berhubung dengan tujuan perjanjian opsyen itu.

[4] Keseluruhan pembangunan dusun tersebut adalah secara usahasama bagi satu tempoh selama 15 tahun. Oleh itu, walaupun mereka tidak merupakan rakan kongsi di bawah Akta Perkongsian, terdapat perhubungan fidusiari di antara mereka bagi mewajibkan perayu untuk mengingatkan Encik Chan, walaupun menjangkakan bahawa pihak-pihak terkemudian berniat untuk menjual harta itu sepertimana yang didakwa, bahawa fasal 11 perjanjian pajakan itu menghendaki supaya harga belian ditetapkan oleh seorang penilai yang akan dilantik oleh mereka secara bersesama. Ianya merupakan kemungkinan niat baik dan kewajipan fudusiari bagi perayu membeli hartanah itu pada harga sebanyak RM80,000 tanpa mendapatkan pendapat penilai profesional sepertimana yang ditetapkan oleh fasal 11.

[5] Melalui perjanjian pajakan itu, perayu haruslah membelanjakan lebihkurang RM100,000 untuk menukar tanah yang tandus itu kepada sebuah dusun, tetapi hanya mendapat pulangan sebanyak RM35,000 setahun daripada tahun 1984 dan seterusnya. Dengan itu, apabila pajakan itu luput dalam tahun 1986, perayu tersebut hanya berjaya untuk memperolehi kembali modal yang telah dibelanjakan dengan hanya sedikit keuntungan sahaja, itu pun jika ada. Bagi pulangan yang sebegitu rendah, tentu sekali terdapat salah kiraan dalam pembangunan secara usaha sama akan tanah itu di pihak perayu. Sebaliknya, Encik Chan, sementara tidak mendapat apa-apa daripada tanah itu selama 15 tahun, akan selepas itu memperolehi keuntungan dengan menjadi pemunya sebuah dusun yang berharga. Dalam keadaan yang sedemikian, ianya tidak salah bagi Hakim yang bijaksana mendapati bahawa ianya merupakan perkara biasa bagi Encik Chan untuk ingin mengetahui dalam tahun 1977 nilai bakal dusunnya itu. Ianya dengan itu mudah bagi perayu menggunakan kedudukan itu dengan secara fraud menyatakan secara salah bahawa dokumen opsyen yang diperkatakan itu bukannya untuk tujuan jualan kepadanya tetapi hanya untuk menguji pasaran hartanah. Motif dan peluang bagi plaintif melakukan fraud ke atas mendiang Encik Chan melalui dokumen opsyen itu adalah terlalu jelas.

[6] Dalam konteks persetujuan perniagaan antara mereka, sepertimana yang dikemukakan oleh perjanjian pajakan itu, tidak diragui lagi bahawa fraud telah ditentukan oleh perbuatan perayu dalam menipu dan memaksa si mati untuk menandatangani perjanjian opsyen itu dalam lingkungan maksud s. 17 Akta Kontrak 1950. Kami tidak dapat melihat apa-apa tujuan bagi perjanjian opsyen itu selain daripada satu muslihat untuk melucuthak mendiang Encik Chan daripada nilai sebenar dusun itu.

[7] Selain daripada keadaan tidak relevan akan laporan penilaian perayu untuk menyokong harga sebanyak RM80,000 itu di bawah fasal 11, laporan itu jelas tidak mematuhi prinsip penilaian dalam menentukan samada dusun itu seharusnya ataupun tidak dinilaikan sebagai sebuah hartanah yang dibebankan, oleh perjanjian pajakan itu. Ianya adalah salah untuk menilaikan dusun itu sebagai sebuah hartanah yang dibebankan ketika dalam tempoh pajakan berdaftar sedangkan bakal pembeli adalah juga penerima pajakan.

[8] Pajakan itu dengan itu tidak boleh membentuk satu bebanan bagi tujuan penilaian. Pengakuan asas penilaian yang tidak betul hanya boleh bermakna bahawa laporan penilaian plaintif yang menetapkan harga sebanyak RM80,000 adalah sesungguhnya salah dan mestilah ditolak. Oleh kerana harga belian sebanyak RM80,000 adalah tidak boleh

dipercayai dan amat tidak mencukupi dan ditetapkan dalam kemungkiran fasal 11 perjanjian pajakan itu, pelaksanaan spesifik tidak seharusnya dalam apa-apa keadaan diberikan.

[9] Asas remedi bagi pelaksanaan spesifik bergantung pada ekuiti dan oleh yang demikian, yang mana oleh kerana plaintif tidak mengetahui apa-apa, Mahkamah adalah berhak dalam apa keadaan pun untuk menolak remedi agar dapat melindungi penjual daripada menjadi mangsa amalan yang tidak baik.

[10] Di mana pengataan fraud dalam prosiding-prosiding sivil berkaitan dengan fraud jenayah seperti komplot untuk memfraud, atau melesapkan wang atau jenayah pecah amanah, ianya menjadi undang-undang tetap bahawa beban membukti adalah standard membukti jenayah yang tidak diragui, dan bukannya berdasarkan imbangan kebarangkalian. Walaubagaimanapun, di mana pengataan adalah semata-mata diasaskan atas fraud sivil dan bukannya kelakuan jenayah atau suatu kesalahan, beban sivil adalah terpakai.

[11] Kami bersetuju dengan kedua-dua Peguam bahawa setakat pernyataan umum undang-undang dalam *Lau Kee Ko & Anor. v. Paw Ngi Siu* [1974] 1 MLJ 21 difahamkan sebagai bermakna suatu penolakan semata-mata akan beban jenayah dalam kesemua kes-kes fraud ianya tidak lagi merupakan undang-undang yang baik.

[12] Amalan licik sepertimana yang dilakukan oleh perayu ke atas si mati di sini tidak membawa kepada suatu kesalahan jenayah. Perbuatan memfraud yang diadukan bukan hanya dapat mendapatkan perjanjian opsyen itu, tetapi juga dalam menggunakan dokumen bagi sesuatu tujuan yang memungkiri fasal 11. Oleh kerana pengataan fraud adalah bersifat sivil dan tidak berdasarkan atau dikaitkan dengan kesalahan jenayah, Hakim yang bijaksana tidak tersalah pertimbangan di sisi undang-undang dalam memakai beban membukti sivil.

[Rayuan ditolak.]

Cases referred to:

Arabinda Barma v. Chandra Kanta AIR [1954] Assam 94 ***(cit)***
O'Neil v. Arnew [1976] 78 DLR (3d) 671 ***(refd)***
Pateman v. Pay [1974] 232 EG 457 ***(refd)***
Lau Kee Ko & Anor. v. Paw Ngi Siu [1974] 1 MLJ 21 ***(not foll)***
A.L.N. Narayanan Chettyar & Anor. v. Official Assignee High Court Rangoon AIR [1941] PC 93 ***(refd)***
Hansraj Gupta & Ors. v. Dehra Dun. Mussoorie Electric Tramway Co. Ltd. AIR [1940] PC 98 ***(refd)***
M. Ratnavale v. S. Lourdenadin [1988] 2 MLJ 371 ***(refd)***
Saminathan v. Pappa [1981] 1 MLJ 121 ***(refd)***

Datuk Jagindar Singh & Ors. v. Tara Rajaratnam [1986] 1 MLJ 105 ***(refd)***
Chu Choon Moi v. Ngan Sew Tin [1986] 1 MLJ 34 ***(refd)***
Eastern & Oriental Hotel [1951] Sdn. Bhd. v. Ellarious George Fernandez & Anor. [1989] 1 MLJ 35 ***(refd)***
United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn. Bhd. [1993] 2 CLJ 31 ***(foll)***
Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd. [1988] 3 MLJ 218 ***(foll)***

Legislation referred to:
Contracts Act 1950, ss. 17, 18
National Land Code, s. 340(2)

Other source referred to:
Osborne's Concise Law Dictionary, 8th Edn., p. 152

[Appeal from High Court of Malaya, Johor Bahru; Civil Suit No: 790 of 1977]

For the appellant - C.V. Das (Rosita Yeo with him); M/s. Yeo & Co.
For the respondent - Cecil Abraham (Dhinesh Baskaran with him); M/s. Shearn Delamore & Co.

JUDGMENT

Mohd. Azmi FCJ:

The plaintiff's claim was for an order of specific performance of an option agreement dated 5 January 1977, allegedly given by Mr. Chan Weng Sun, the late husband of the defendant (respondent before us), in respect of sale and purchase of a fruit plantation (hereinafter referred to as 'the dusun'), with an area of 19 acres, 1 Rood and 3 Poles under Grant 23933 Lot 47 in the Mukim of Plentong, District of Johor Bahru. On the pleadings and the evidence, it was the plaintiff's case that the option to purchase the dusun at a price of RM80,000 had been exercised on 14 November 1977, but during his lifetime, the deceased Mr. Chan and now his widow Madam Yim Yut Kiu (the respondent/defendant) as the personal representative of his Estate, had neglected and refused to honour the agreement. The defendant's contention was that the purported option was obtained by fraudulent means and was therefore null and void and unenforceable, and that the late Mr. Chan during his lifetime was under no obligation to complete the said option agreement. Fraud and other defences in the alternatives were pleaded in the Statement of Defence including false representation, *non est factum* and failure of consideration.

It is important to note at the outset that the dusun in the 1977 option agreement was also the subject matter of an earlier business arrangement between the two parties as represented by a lease agreement, entered by them in 1971

for a period of 15 years. The 1977 option agreement was thus executed during the currency of the lease agreement to run over a period of 9 years until the expiry of the lease in 1986. It must also be observed that the friendly relationship between the plaintiff and the late Mr. Chan started way back in 1968 and it is fair to assume that their friendship would have continued until the deceased's last days had it not been for this unfortunate dispute.

After a lengthy and intermittent hearing which commenced on 10 April 1991, and concluded on 14 December 1992, the learned trial Judge dismissed the plaintiffs claim. He found on the evidence that the defence had succeeded in establishing fraud and at p. 15 of his judgment dated 28 November 1993 the learned Judge held:

> I make a finding that the defence had succeeded to that degree required in raising the defence of fraud that if the deceased knew it was an option to the plaintiff, to sell the land at that price of RM80,000 and binding the land for 9 years he would not have signed it.
>
> I come to this conclusion as I believe and accept defence contention that the land was ancestral land to be given to the son. The family was not in need of any money to have to sell the land and there is no reason to do so. The deceased was comfortable in life, if not wealthy, and as a family it was a picture of peace and harmony of a good Christian family. There was no reason why the father would not have handed the land to the son as he had been a dutiful son and had kept up the family name by being a good student. He was proud of him. The conditions are all there for him to have done that.
>
> The subsequent conduct of a person often tells us of his antecedent act eloquently or the mind behind the act and can indicate what has transpired.
>
> I am very clear that when the father discovered that he had signed an option in error after knowing all the consequences of same, he was in a fury and on seeing the plaintiff for the first time thereafter he lost no time to scold him, in no uncertain terms, for having cheated him though he had been a good friend. His reaction was a normal reaction of a man who had been 'done'.
>
> As for his wanting to know the price of the land, it was a natural or everyday urge one would have like to know the value of the property that he had in his possession. I do not consider anything unusual about that, to satisfy a curiosity.
>
> To the plaintiff, he had opportunity to perpetrate what he did and one could see the harm to him if the said land was in fact sold to someone else. It was already leased to him, in his hand so to speak.
>
> Since it is my decision that the defence had made out fraud to the degree required, my decision is I dismiss the plaintiff's claim with costs to be taxed.

The main issue for determination in this appeal is whether on the various findings of fact made by the learned trial Judge against the plaintiff it would be sufficient to prove that the option agreement was obtained by fraud so as

to render it unenforceable. The question is, did the plaintiff fraudulently mislead the late Mr. Chan? And if so, was there a possible motive for such misconduct against a business friend? On the issue of fraud, it is the duty of this Court to examine the evidence independently and came to our own findings either in agreement or otherwise with the findings of the trial Judge (see *Arabinda Barma v. Chandra Kanta* AIR [1954] Assam 94).

At the trial, the deceased's son, Chan Seng Onn (DW2) who is a qualified lawyer, and Madam Yim Yut Kiu (DW1) played a paramount role in establishing the fact that the deceased could not possibly entertain any idea of selling the dusun to anyone, as it was a well-known fact in the family that the land was ancestral property to be passed over to the children. A deed of gift dated 9 March 1978 was produced to show consistency in the defendant's averment that the ancestral land could never be for sale. Further, at the material time neither the late Mr. Chan nor his family was hard pressed for money, and there was also hardly any reason at all for the parties to enter into a separate option agreement in 1977 when the existing lease agreement over the same property was still in force and would continue till 1986. The following evidence of the widow (DW1) is relevant:

> If in 1977 my husband and I had wanted to sell this land we would have consulted my son, a lawyer and a valuation officer. In 1977 I did not know the value of the land. My husband was not aware of the value of that land. We had never visited the land between 1971 to 1977. We visited the land in November 1977 after the option was signed.
>
> We visited the land in 1977 because of this incident – we wanted to see a lawyer. He was not in and so we visited the land. My husband was not aware of the value of the land in Johor Bahru. I do not know what an 'option' is.

Further down in her evidence, she testified:

> My husband kept the document he signed in the drawer thinking that it was not an important document as it had no stamp and the paper was also of poor quality. In July 1977 my son was attached to the army in Singapore. He visited me every Saturday and went back to his camp on Sunday. This document was not shown to my son. I had forgotten of that document.
>
> AFBD-6 – AFBD-12 – These documents were not shown to my son.
>
> At the end of October 1977 my son who was searching something in the drawer discovered that document. My son told my late husband the document was selling that piece of land to Ang and my husband would be tied down about 9 years and the purchase price of RM80,000. My son enquired if Ang paid him RM1. He replied in the negative. My late husband was very angry and saying that Ang cheated him. My son advised us to see a lawyer.

Mr. Das for the appellant was at pains to point out that the sale of the property to the plaintiff under the option agreement was nothing new or strange because in cl. 11 of the 1971 lease agreement and as well as cl. 9 of the registered lease, the plaintiff had the right to purchase. But what is seriously bothering us is that, if the plaintiff could purchase the property under the terms of the lease, then what was the need for the 1977 option agreement? This important right of first option to purchase the property given to the plaintiff under cl. 11 of the lease agreement provides:

> In the event of the lessor desiring to sell the said land during the term of this lease, the lessor must sell the said land only to the lessee **at a price to be fixed by a qualified valuer to be appointed by both the parties**. If the lessee does not agree to purchase the said land at a price valued by a qualified valuer then the lessor shall not have any right to sell the said land to anyone during the period of this agreement.

Subject only to the express method of determining the sale price, cl. 11 already granted the plaintiff the first option to purchase should the late Mr. Chan decide to sell. In fact this special clause also contained a restrictive covenant which totally prohibited the sale of the property to anyone else during the currency of the lease, even if the plaintiff had declined to purchase the property. The purpose of executing the 1977 option agreement whilst cl. 11 was still in operation under the lease, is therefore in question.

It is important to observe that the selling price of RM80,000 in the 1977 option is in conflict with the express intention of the parties under cl. 11 of the lease that the price should be valued by a qualified valuer to be mutually appointed by both parties. The arbitrary price of RM80,000 in the disputed option document would appear to be the plaintiff's own concoction to which the late Mr. Chan ought not and could not on balance of probabilities have agreed without the benefit of a professional valuation at the material time. The two valuation reports produced were prepared in 1984 and 1992 long after the event, and as such they were not reliable and relevant for the purpose of satisfying cl. 11.

In the circumstances of this case, it could not be true as alleged in the testimony of the plaintiff (PW2) that it was the late Mr. Chan himself for some unknown reason who had told him that he wished to sell the property at the price of RM80,000. If the deceased had any intention to sell the dusun, both the parties would have known that under the lease the deceased could not sell it to anyone except the plaintiff, and that the price should be fixed by a valuer to be jointly appointed by them. In our view, the learned trial Judge was entitled to accept the defence explanation that in fact it was the plaintiff who wanted the document to be executed and that the late Mr. Chan had been fraudulently induced by misrepresentation as to the purpose of the option agreement. He was led to believe by the plaintiff that the document would

not in any way affect his legal rights under the lease but was merely to enable the plaintiff to invite offers from the public for the purpose of testing the current value of the dusun for their personal enlightenment. For reasons which we shall give later, we find normalcy, as did the trial Judge, in the natural desire of the deceased to know roughly the value of his dusun at that juncture of the lease period – a natural desire which the plaintiff had exploited to perpetrate his fraud.

The importance of the deceased's immediate reaction to the plaintiff's solicitors' letter dated 15 November 1977 about the exercise of the disputed option could not be under estimated. His reply dated 22 November 1977 to M/s. A.L. Looi was as follows:

> I thank you for your letter dated 15 November 1977 on the above matter.
>
> The option referred to in the 2nd paragraph of your said letter to sell my said land is denied by me.
>
> Sometime in November 1977 your client came to me and saw me at my residence. I told him that the above purported option was made without explaining to me. I refuse to accept the paper and I refuse to sell to your client as the contents of the said paper is void and invalid.
>
> In the circumstances I deny that the said paper is an option to sell my land. I refuse to sell my land therefore.

Before us, the main criticism mounted against the decision of the learned Judge centres on the alleged ambiguity in his written judgment as to whether His Lordship intended to make a finding on fraud or *non est factum*. Whatever imperfection there might be in the judgment, reading it as a whole, particularly the part quoted earlier, it is sufficiently clear to us that the learned Judge was dealing with the defence of fraud and did find that the defendant had discharged the burden of proof on that plea, based on the particulars of fraud pleaded in para. 4 of the statement of defence, *viz:*

> The plaintiff orally represented to the defendant at No. 32, Borthwick Drive, Singapore 19, some time in July 1977, immediately before the signing of the said option agreement, that the said document was merely an authority given to the plaintiff to enable him to invite offers from the public as to the price of the said property and that signing the said document would in no way affect the defendant's legal rights, whereas in fact the said document was an option to sell the said property to the plaintiff for the sum stated therein. The plaintiff made the said representation fraudulently either well knowing that it was false or recklessly not caring whether it was true or false. By means of the said false and/or fraudulent representation the plaintiff induced the defendant to sign the said agreement.

The crucial issue of fact to be determined was, did the plaintiff fraudulently induce the defendant to sign the option document by falsely representing to him that the option was merely intended as an authority to enable the plaintiff to test the property market by putting up the dusun for sale? On balance in the evidence, the learned Judge answered it in the affirmative, and commented that he did not consider anything unusual in the defendant as a landowner "wanting to know the price of the land", as it was a natural or everyday urge of any landowner to know the value of his property. Learned Counsel for the appellant disagreed with the conclusion and questioned the necessity of signing a document if all that the defendant wanted to know was the value of the land. In our view the reasonableness and correctness of the learned Judge's conclusion can be tested against the undisputed factual situation of the case.

Firstly, the close business friendship between the late Mr. Chan and the plaintiff started in 1968 when the plaintiff first became interested in developing the land in dispute into a fruit plantation. Secondly, on 4 July 1971 the 19-acre property was leased to the plaintiff for 15 years at what appeared to be a nominal rent of RM350 per year, which works out at about RM18 per acre per annum or RM1.50 per month. However it must be obvious to the late Mr. Chan at that point of time that the nominal rentals made good business sense, because in return, the plaintiff on his part was to invest considerable sum of money (about RM100,000) to turn the barren property into a profitable dusun by levelling the land, clearing the jungle, building access road, and quarters for the workers. Pursuant to the lease agreement, the plaintiff planted durians, lemon, lime trees, mango, bananas and rambutan on a commercial basis. According to plaintiff's evidence, initially there was as expected no income at all from the land, but in later years, particularly from 1984 the plaintiff was able to earn about RM30,000 to RM40,000 per annum. Taking an average income of RM35,000 per year, by the time the lease ended in 1986, it would be reasonable to assume that in all possibilities, the plaintiff could only manage to get back his capital expenditure with, if at all, very narrow margin of profits. For such a low return, there must be miscalculation somewhere in the joint venture development of the land on the part of the plaintiff. On the other hand, it must be remembered that Mr. Chan practically got no income at all from his land for 15 years but in return, out of jungle land, he would reap the benefit of being the owner of a valuable orchard. In these circumstances, we do not think it was wrong for the trial Judge to find normality in the late Mr. Chan's curiosity in 1977, i.e. about six years after the project had started, to know the current value of his up and coming dusun. As such, it was easy for the plaintiff to exploit the situation fully by fraudulently misrepresenting that the so-called option document was not for the purpose of sale to him but merely

to enable him to test the property market. By such sharp practice the plaintiff would have the advantage of buying the dusun without proper valuation which would not otherwise be possible if the sale and purchase had been transacted under the existing cl. 11 of the lease agreement.

Hence the motive and opportunity for the plaintiff to commit fraud on the late Mr. Chan by means of the option document is all too clear and self-evident. It is true that the plaintiff could have invoked his current rights under cl. 11 of the lease to purchase the property but Mr. Chan might not want to sell, and even if he could have been persuaded to do so, the requirement of a jointly appointed valuer would have defeated the object of the fraudulent plan. Until the expiry of the lease in 1986, the late Mr. Chan was contractually prohibited from selling the property to anyone except the plaintiff. So, there was no conceivable reason why in 1977 the deceased should suddenly entertain the idea of selling the property by means of a fresh option to purchase to the plaintiff at a ridiculously low price of RM80,000 (about RM5,000 – per acre) when there was already in existence a mechanism in the lease agreement for such eventuality, subject only to the price being fixed by a professional valuer. Having regard to the whole evidence in the court below, we agree with the learned Judge that the defendant had successfully establish fraud and that the plaintiff's claim for specific performance of the 1977 option agreement be dismissed. We could not see any purpose of the option agreement other than as a ploy to deprive the late Mr. Chan of the true market value of the dusun.

Notwithstanding the irrelevancy of the two valuation reports (Exh. PBD-1 and D19) for the purpose of cl. 11, the vast difference in valuation is amazing. As at 5 January 1977 the valuation report prepared by Param & Associates for the appellant/plaintiff put the valuation at around RM6,000 per acre on the basis that the property could not be sold except to the lessee until expiry of the lease on 3 July 1986. Taking into account this contractual constraint, the fair market value of the property was fixed at RM74,300. On the other hand, the defendant's valuation report put the market value at RM190,000 as at 5 January 1977, and at RM840,000 as at the expiry of the lease on 3 July 1986. Such vast discrepancy in valuation would certainly justify the requirement of a joint valuation under cl. 11, the breach of which should not assist the plaintiff in obtaining the equitable remedy of specific performance.

There was no evidence that the deceased was in any financial difficulty in 1977. As such, if his valuation report (Exh. D19) were to be believed, there was no conceivable reason why he should wish to sell the 19-acre dusun to the plaintiff for a mere RM80,000 when he could have waited until the expiry of the lease before selling the ancestral property at a price of RM840,000.

In our view, the three letters written in 1977 by the late Mr. Chan are consistent with the defence version that the deceased at no time had any intention to sell the ancestral land to anyone. (see letters dated 5 November 1977; 22 November 1977; and 10 December 1977) at pp. 471, 547 and 638. We agree with the learned Judge that the option agreement was brought into existence by the plaintiff's fraud as alleged by the defence. In the circumstances of the present case, the fact that prior to the issue of writ, neither the deceased, nor members of his family had used any of their letters the word 'cheating' or 'fraud' is not by itself fatal. What the court has to decide is whether in the totality of the oral and documentary evidence, there was fraud as defined in s. 17 of the Contracts Act 1950. In this case there was opportunity to commit the fraud, and there was motive; there was no reason for the sale of the ancestral property and finally there was no reason to sell the property by option to purchase when there was already cl. 11 in the lease agreement for such sale to the plaintiff prior to the expiry of the lease without the necessity of a fresh option agreement. In our view, there is ample evidence of fraud to transfer the property by means of the option agreement. For reasons already advanced, we are satisfied that the plaintiff's assertion, that the intention to sell the property to him originated from the deceased was entirely against the weight of the evidence. In the context of the business arrangement between them, as represented by the lease agreement, there can be no doubt that fraud had been established by the plaintiff's act in deceiving and inducing the deceased to sign the option agreement within the meaning of s. 17. This is certainly not a case of the deceased family trying to rescue him from a poor bargain. On the contrary it is a case of the plaintiff trying to rescue himself from a narrow margin of profit under the lease agreement after investing RM100,000. It is a common principle of valuation that an unencumbered property would fetch a better price than one that is encumbered. This is clearly reflected from the conflicting opinion in the two valuation reports which show a vast difference between the encumbered value of the dusun in 1977, and the unencumbered value at the expiry of the lease in 1986. Such difficulty fixing in the reasonable price would have been avoided if the plaintiff had stuck to his bargain in the lease agreement, whereby a valuer must be appointed by both parties for the purpose of any sale to the plaintiff. Apart from the irrelevancy of the plaintiff's valuation report to support the price of RM80,000 under cl. 11 sale, the valuer had also rendered it unreliable by admitting in the witness box that the report did not comply with the principle of valuation in determining whether or not the dusun should be valued as an encumbered property, by reason of the lease agreement. On the facts of this case, it is clearly wrong for the plaintiff's valuer to value the dusun as an encumbered property during the period of the registered lease, when the intended purchaser is also the lessee.

As conceded by the appellant's valuer in the Court below that if the purchaser was the lessee himself, the lease could not form an encumberance for the purpose of valuation. The valuation report produced by the appellant was prepared by Mr. K. Parampathy of M/s. Param & Assocs. Under cross examination, Mr. Parampathy made a startling revelation that he was not told about the purchaser being the lessee. Now, why did the plaintiff keep such an important fact from his own valuer? What was he afraid of? Was he trying to prevent the valuer from knowing that the correct valuation should be done under cl. 11 of the lease? In any event, the unreliability of the RM80,000 valuation could not be cured simply by the off-the-cuff correction in the witness box by Mr. Parampathy that "**If the purchaser is the lessee Mr. Ang the value is RM115,608.**" The admission on the incorrect basis of valuation can only mean that the plaintiff's valuation report fixing the sale price of RM80,000 is totally wrong and must be rejected. The defendant's valuation report gave almost double the plaintiff's valuation, *viz.* RM190,000 in 1977 and RM840,000 in 1986. Since the sale price of RM80,000 is unreliable and grossly inadequate and fixed in breach of cl. 11 of the lease agreement, specific performance ought not in any event be granted [see *O'Neil v. Arnew* [1976] 78 DLR (3d) 671]. Further in *Pateman v. Pay* [1974] 232 EG 457 it was held that where an option agreement drafted by the purchaser was not understood by the vendor, despite absence of deliberate fraud, the purchaser's claim for specific performance or damages was dismissed where there was element of sharp practice. The basis of the remedy of specific performance lies in equity and as such whereas in the present case the plaintiff did not come with clean hands, the Court was entitled in any event to refuse the remedy in order to protect the vendor from being a victim of sharp practice.

Looking at this case from another angle, the whole development of the dusun was in the nature of a joint-venture for a period of 15 years, with the late Mr. Chan providing for the land and the appellant providing the expertise and financial needs of the project. In the circumstances, it is fair to say that although they were not partners under the Partnership Act, there was a fiduciary relationship between them which generated an obligation on the part of the appellant to remind the late Mr. Chan, even assuming for one moment for the sake of argument that Mr. Chan did have the intention of selling the property to him, that cl. 11 of the existing lease agreement between them required the purchase price to be fixed by a valuer to be appointed by them jointly. In our opinion, it was a breach of good faith and fiduciary duty for the appellant to purchase the property at RM80,000 without first obtaining the opinion of a professional valuer as stipulated in cl. 11.

In view of our conclusion on the issue of fraud, there is no necessity for us to deal with the defence of *non est factum,* and as such, the question of "want of care" need not be gone into. Nor is it necessary for us to go through

the defendant's alternative argument that the plaintiff had failed to exercise the option in accordance with its express terms, or the other argument that the appellant should not be granted damages in lieu of specific performance as this claim was not pleaded on the basis of alternative remedy.

The remaining issue for our determination is one of law on the nature of the burden of proof on fraud in civil proceedings. In this case, the learned trial Judge found fraud on the basis of burden of proof as laid down by the Federal Court in *Lau Kee Ko & Anor. v. Paw Ngi Siu* [1974] 1 MLJ 21, where His Lordship Raja Azlan Shah J (as he then was) speaking for the Federal Court held:

> It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.

In that case the Federal Court was considering the question of civil fraud, *viz.* error regarding the person with whom a party was contracting in a non-disclosure situation. The following passage in the judgment of Raja Azlan Shah J (as he then was) at p. 23 is worth noting:

> In my opinion what is important in a case like the present is whether consideration of person with whom the respondent was contracting formed a material element of the contract. If the answer is "yes" then, non-disclosure of the undisclosed principal annuls the contract. That may amount to fraud. The law is laid down by Fry J, (as he then was) in *Smith v. Wheatcroft* [1878] 9 Ch. 223, 230 where he quotes and approves *Pothier, Traite des Obligations* where he says:
>
> > Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract .... On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting the contract ought to stand.
>
> That passage has been applied to cases analogous to the present *viz.*, by North J in *Nash v. Dix* [1898] 78 LT 445, 448, 449, by Smith LJ in *Gordon v. Street* [1899] 2 QB 641, 647 and by McCardie J in *Said v. Butt* [1920] 3 KB 497, 501.

Counsel for the appellant has referred to us authorities which with few exceptions seem to establish the proposition that the criminal burden is applicable to every allegation of fraud, but it must be noted that the majority of the leading authorities on the subject were dealing with criminal fraud in civil proceedings. The first authority is Lord Atkin's judgment in *A.L.N. Narayanan Chettyar & Anor. v. Official Assignee High Court Rangoon* AIR [1941] PC 93, where the Privy Council held that fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture. In that case, the evidence was voluminous and consisted in large part on entries in account books. The fraud alleged by the plaintiff was that the sale of certain property was fictitious as a result of an alleged conspiracy between one Mr. Kasi and Mr. Subbaya to defraud the plaintiff's firm. There was difficulty in the evidence to ascertain the nature of the conspiracy. It was mainly for this reason that the Privy Council agreed with the appellate Court that the finding of fraud by the subordinate Court was based on mere suspicion arising from entries made in the account books.

The second authority is another Privy Council case of *Hansraj Gupta & Ors. v. Dehra Dun. Mussoorie Electric Tramway Co. Ltd.* AIR [1940] PC 98, where it was held the party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. Unless therefore the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. The facts of the case again involved complicated evidence arising from the claim of a company through its liquidators of a sum of money against the defendants, on the ground of fraudulent conspiracy of one Mr. Raghumal and his agent Mr. Lala Mela Ram in the misappropriation of the sum claimed. Since there was evidence that they were working in good faith the evidence was insufficient to prove fraud.

The third authority is by our Supreme Court in the case of *M. Ratnavale v. S. Lourdenadin* [1988] 2 MLJ 371, which is also a case involving a criminal conspiracy to defraud under the National Land Code. It was held that the criminal standard was required to prove fraud and suspicion, however grave, is not proof for the purpose of defeating the indefeasibility of title under s. 340(2) National Land Code.

Other cases cited include Privy Council case of *Saminathan v. Pappa* [1981] 1 MLJ 121 where at pp. 123 and 124, Suffian LP in the Federal Court cited *Narayanan Chettyar* for the proposition that the defendant must prove fraud not on a balance of probabilities but on beyond reasonable doubt for the purpose of proving the plaintiff's name as registered owner under s. 340 of the National Land Code. On the evidence the Federal Court found no evidence of fraud

at all because in the first place it was the Ruler in Council who had rejected the defendant's application to have the land transferred to him, and subsequently, on the plaintiff's application, the Ruler in Council consented to transfer the land to her. At p. 124 Suffian LP said:

> As regards the plaintiff's alleged fraud in misrepresenting to the Ruler in Council that the defendant was in India when he was in fact in Malaysia and that Palaniandy and the defendant were no longer interested in the land, as already stated the burden is on the defendant to prove the plaintiff's alleged fraud beyond reasonable doubt. Has he done so? The only evidence of fraud came from the Collector who appeared in the witness box and who also handed over to the Court the relevant file from his office. But with due respect I do not think that that was enough. There was no evidence that he was a member of the Executive Council that advised the Ruler on the defendant's and plaintiff's application. It is true that the paper submitted to the Executive Council on the plaintiff's application (p. 159 of the appeal record) mentioned only the two P.A.s and did not mention the sale agreement P2, but there was no evidence from any member or the Secretary of the Council or in what way the contents of the paper or omissions from it influenced their decision one way or another, it being quite well-known that even if all documents were in order the Ruler in Council could still refuse his consent to an application of this kind, decisions on which being made on grounds of public policy, not on consideration of law. I would therefore respectfully disagree with the learned judge that the defendant has satisfied the court beyond reasonable doubt that the plaintiff has been guilty of fraud.

The criminal standard, i.e. proof beyond reasonable doubt was also applied by the Privy Council in *Datuk Jagindar Singh & Ors. v. Tara Rajaratnam* [1986] 1 MLJ 105. There the fraud was based on a criminal breach of trust and undue influence in the transfer by the plaintiff's land. At p. 110, Lord Keith held:

> ... Nevertheless he, and also the Federal Court, correctly directed themselves that the standard of proof of fraud in civil proceedings was the criminal standard of proof beyond reasonable doubt.

Again, in *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ 34, the Supreme Court held at p. 38:

> ... We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan v. Official Assignee High Court Rangoon; Saminathan v. Pappa*). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the Court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt. (See 'proved' at s. 3 of the Evidence Act 1950 and

Liew Kaling & Ors. v. Public Prosecutor.) In the present appeal before us, the facts and circumstances of the case in relation to the part played by the respondent point to the probability that any prudent man would under the circumstances accept it to be fraudulent.

Again in *Eastern & Oriental Hotel* (1951) *Sdn. Bhd. v. Ellarious George Fernandez & Anor.* [1989] 1 MLJ 35 at 38, the Supreme Court reaffirmed, following *Saminathan v. Pappa (ante.)* that onus of proof of fraud in this country is proof beyond reasonable doubt.

However, for forgery in bank charges, the Supreme Court in applying the civil burden of proof held in *United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn. Bhd.* [1993] 2 CLJ 31; [1993] 1 MLJ 182 at 188 following S*yarikat Islamiyah v. Bank Bumiputra Malaysia Bhd.* [1988] 3 MLJ 218:

Another important matter has been raised by the appellant in connection with the issue of forgery. It was argued for the appellant both in the court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt and *Syarikat Perkapalan Timor v. United Malayan Banking Corp. Bhd.* [1982] 2 MLJ 193 was cited in support. We have examined this decision with some care but we are unable to agree with the appellant's counsel that it is authority for the proposition that is put forward for the appellant. In our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities and in this respect, we agree with the statement of the law by Gunn Chit Tuan J (as he then was) in *Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd.* where at p. 220 the learned Judge said:

> In this can although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang alias Che Mah bin Che Loh, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiff's authority and were therefore wholly inoperative.

We are therefore of the opinion that the learned Judge did not misdirect himself on the measure of proof that is required to bring home a case of forgery on the facts of such a case as the one before us.

From the wide definition of 'fraud' under s. 17 of the Contracts Act 1950, and as well as the leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud, or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on a balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot be based on suspicion

or speculation merely. In allowing the appeal in *Lau Kee Ko & Anor. v. Paw Ngi Siu* the Federal Court reversed the judgment of the High Court on the finding of a civil fraud in a non-disclosure dispute wherein the plaintiff was led to think that he was contracting with the owner when in point of fact he was contracting with an agent. The fraud alleged was purely civil in nature and based on whether there was any personal consideration when the plaintiff entered into the contract, and on that basis the burden of proof is the civil burden. We agree with both counsel that to the extent that the general statement of the law in *Lau Kee Ko* is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no longer good law. But where the allegation of fraud (as in the present case) is entirely founded on a civil fraud and not based on a criminal conduct or offence, the civil burden is applicable.

From all the authorities cited before this Court, it seems clear that fraud can be civil or criminal in any civil proceedings. Hence the *Osborne's Concise Law Dictionary,* 8th Edn. p. 152 defines fraud as follows:

> The obtaining of a material advantage by unfair or wrongful means; it involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly. If the fraud causes injury the deceived party may claim damages for the tort of deceit. A contract obtained by fraud is voidable at the option of the injured party. Conspiracy to defraud remains a common law offence the *mens rea* of which has been defined as 'to cause the victim economic loss by depriving him of some property or right corporeal or incorporeal, to which he is or would or might become entitled,' per Lord Diplock in *R. v. Scott* [1975] AC 814. Certain other frauds are likewise criminal offences, e.g. under the Prevention of Fraud (Investments) Act 1958.

Indeed, our s. 17 Contracts Act 1950 recognises the various shades of fraud by defining it as follows:

> "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge of belief of the fact;
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive; and
>
> (e) any such act or omission as the law specially declares to be fraudulent.

Explanation – Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person, keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

The definition of "fraud" read in conjunction with the authorities, lead us to the conclusion that where the fraud alleged in civil proceedings is based on a criminal offence, then the criminal burden of proof beyond reasonable doubt must be applied. But where the fraud alleged is purely civil in nature, there is no reason why the civil burden should not apply.

The particulars of fraud pleaded by the defendant in this appeal falls under s. 17 read with "misrepresentation" under s. 18. "Misrepresentation" is defined to include:

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

In this case, the sharp practice perpetrated by the appellant on the deceased did not amount to a criminal offence. Although the late Mr. Chan might have known that he was signing an option agreement, we are satisfied that both parties knew all along that the document was merely intended to be used not for actual sale to the plaintiff but for the purpose of enabling him to test the property market. This explains why the sale price of RM80,000 was never fixed in accordance with cl. 11 of the lease agreement. The fraudulent act, complained of was not only in the procurement of the option agreement, but also in using the document for a purpose in breach of cl. 11. Since the allegation of fraud was purely civil in nature and not based on or connected with a criminal offence, the learned Judge did not err in law in applying the civil burden of proof. In any event, for reasons already advanced, the remedy of specific performance ought not to be granted in the circumstances of this case and as such the decision of the learned Judge in refusing to grant the remedy must be upheld.

We would dismiss this appeal with costs and the deposit should be paid to the respondent to account of taxed costs.

Reported by W.A. Sharif